

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JAMES A. AKOURI and URI, LLC,

Plaintiffs-Appellants,

v

STANDARD FEDERAL BANK, NA,

Defendant-Appellee.

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UNPUBLISHED

August 22, 2006

No. 267613

Oakland Circuit Court

LC No. 2004-062096-CK

Before: Kelly, P.J. and Markey and Meter, JJ.

PER CURIAM.

In this case arising from defendant's decision to refuse plaintiffs' request for a commercial loan, plaintiffs James A. Akouri and URI, LLC appeal as of right the trial court's order granting defendant Standard Federal's motion for summary disposition. We affirm though for reasons different than those stated by the trial court.

I. Facts

Nikolaos Moschouris was presented with the opportunity to purchase a development agent agreement (DA agreement) for rights to the Subway franchise eastern Wayne County territory. Moschouris and Akouri formed URI, LLC along with Akouri's cousin Michael Curis. URI LLC entered into a purchase agreement, one of the terms of which required documentation of the availability of funds within 45 days of execution. Akouri obtained a loan commitment from Comerica Bank, but contacted defendant to obtain a loan with better terms. Wendy Acho, an employee in defendant's targeted business development group, communicated with Akouri during the loan application process. Pete Kelly, a loan officer in defendant's commercial banking department, advised Akouri that defendant was interested in providing the loan.

On April 17, 2003, Kelly sent Akouri an e-mail with an attached loan proposal. On June 30, 2003, Akouri sent Kelly a copy of a new DA agreement. On July 2, 2003, Kelly sent Akouri an e-mail stating that he had not had a chance to review the "new material." On that same day, Akouri sent Acho an e-mail stating, "[Kelly's] got the new agreement in the mail, and should be going over it. I told him it's going to cost him more to get this deal!! You too, BABE!"

In August 2003, Kelly informed Akouri that defendant would not fund the deal. Kelly testified in his deposition that, although he told Akouri that a loan committee had rejected the loan application, Kelly himself had elected not to submit the loan application because

[h]e started this deal in late March. Now we're talking late July. It's a smaller deal. It's a deal that if you look for loans, there was a lot easier deals to be found out there. There is always a fire drill. There's always let's get an answer, we need it immediately, but then okay. It's a five, ten, five-year note, ten-year amortization, five, 15. Now we have a guarantee. Now the guarantee is only three years. I don't want a three year note. Now I want two million. And taking a couple of houses with a second lien on it.

Kelly summed it up by stating, "We've got lender fatigue." Kelly told Akouri that a committee had denied the loan because he wanted to soften the blow. He thought Akouri would accept the denial better if he thought it came from five people rather than Kelly alone.

After Kelly told Akouri that defendant would not provide a loan for plaintiffs' DA agreement, Moschouris, Curis, and three other men formed Eastern Wayne County Development (EWCD), entered into a new agreement for the development rights, and ultimately obtained a loan for their DA agreement from defendant.

According to both Curis's and Akouri's deposition testimony, they spoke with Acho on the telephone about why defendant denied the loan to plaintiffs. Acho stated that a high-level employee showed up in the committee and the bank was tightening its belt because it did not know where Saddam Hussein was and did not know who the next president was going to be. When Curis pressed Acho, she stated that defendant did not lend the money to plaintiffs because "to them you're a bunch of Arab terrorists."

In November 2003, Akouri called Acho and recorded the conversation. According to Akouri's deposition testimony, Acho again stated that defendant considers people like Akouri "a bunch of Arab terrorists." When Akouri stated that he must have had the wrong color skin that day, Acho responded "for the rest of your life." Akouri also testified that Acho stated that the difference between Akouri and one of the other men in EWCD was the color of his skin because Greeks are considered more legitimate than Arabs.

When questioned about the recorded conversation in her deposition, Acho explained:

It's a macroscopic view that we were probably talking about the bank tightening its belt, being conservative on its lending policy. And he continually pressured me for an answer because he wanted a yes, a definitive yes, which I wasn't giving it to him. So I asked him on multiple occasions to step back and look at the wider perspective. Why? Because the sociopolitical conditions of the world were affecting the micro/macroeconomics of what's going on here and why banks are tightening their belts.

Acho also testified that she had no personal knowledge about why Akouri's loan was denied.

## II. Analysis

### A. Discrimination Claim

In plaintiffs' claim under the Elliott Larson Civil Rights Act, MCL 37.2501 *et seq.*, plaintiffs alleged that the DA agreement was a "real estate transaction" and asserted that section 504 of the CRA prohibits discrimination on the basis of race when a person is seeking financial assistance for a real estate transaction. Plaintiffs also alleged that because the loan was going to be secured by Akouri's residential real estate, the transaction fell within section 504. On appeal, plaintiffs assert:

It is undisputed that the instant case falls squarely within the parameters of Section 501 and 504 of the Act inasmuch as it involves a discriminatory practice (denial of a loan based upon race, color and national origin as admitted by Acho) in connection with a loan involving the Purchase of the DA rights relating to real estate site selection, lease negotiation for real property, construction of real property, and opening and closing restaurants located on real property (Section 504(1) of the Act). . . . In addition, the Akouri Loan was to be secured by substantial residential real estate, including Akouri's personal home thereby placing the Akouri Loan under the ambit of Section 504(2) of the Act as well.

In its brief on appeal, defendant asserts, "This issue of whether or not the denial of Plaintiffs' loan application as alleged fell within the purview of the statute was not placed before the trial court as part of Defendant's summary disposition motion."

Nonetheless, we address whether plaintiffs have stated a claim under the CRA upon which relief may be granted.<sup>1</sup> Dismissal pursuant to MCR 2.116(C)(8) is appropriate if the claim is " 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.' " *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999), quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

MCL 37.2102(1) provides generally:

The opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status as prohibited by this act, is recognized and declared to be a civil right.

MCL 37.2504 provides:

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<sup>1</sup> This Court may overlook preservation requirements if failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006).

(1) A person to whom application is made for financial assistance or financing in connection with a real estate transaction or in connection with the construction, rehabilitation, repair, maintenance, or improvement of real property, or a representative of that person, shall not:

(a) Discriminate against the applicant because of the religion, race, color, national origin, age, sex, familial status, or marital status of the applicant or a person residing with the applicant.

(b) Use a form of application for financial assistance or financing or make or keep a record or inquiry in connection with an application for financial assistance or financing which indicates, directly or indirectly, a preference, limitation, specification, or discrimination as to the religion, race, color, national origin, age, sex, familial status, or marital status of the applicant or a person residing with the applicant.

(2) A person whose business includes engaging in real estate transactions shall not discriminate against a person because of religion, race, color, national origin, age, sex, familial status, or marital status, in the purchasing of loans for acquiring, constructing, improving, repairing, or maintaining a dwelling or the making or purchasing of loans or the provision of other financial assistance secured by residential real estate.

Plaintiffs allege that their claim falls within subsections (1) and (2) of subsection 504. Subsection (1) applies to “A person to whom application is made for financial assistance or financing in connection with a real estate transaction.” MCL 37.2501 defines “Real estate transaction” as “the sale, exchange, rental or lease of property or an interest therein.” Plaintiffs applied for a commercial loan for funds to purchase a DA agreement for the Subway franchise, granting territorial rights for the Subway franchise in eastern Wayne County. Plaintiffs assert that the DA agreement is a real estate transaction because it involves “real estate site selection, lease negotiation for real property, construction of real property, and opening and closing restaurants located on real property.” We disagree.

Plaintiffs did not seek a loan from defendant in connection with a real estate transaction. The loan was to be used for the purchase of a business venture. The mere fact that the business that plaintiffs sought to purchase would, at some point, involve real estate matters does not bring the loan within the purview of subsection (1). Nor does the loan fall within subsection (2). Plaintiffs’ assertion that it does relies on the portion of subsection (2), which states that it applies to the “provision of other financial assistance secured by residential real estate.” Plaintiffs assert that the loan was going to be secured by residential real estate, including Akouri’s home. The problem with plaintiffs’ argument is that it fails to consider the rest of subsection (2), which begins, “A person whose business includes engaging in real estate transactions shall not discriminate . . . .” As stated above, MCL 37.2501 defines “Real estate transaction” as “the sale, exchange, rental or lease of property or an interest therein.” Defendant, a bank, is not a person whose business includes engaging in “the sale, exchange, rental or lease of property or an interest therein.” Consequently, subsection (2) is not applicable to the loan even if it was to be secured by Akouri’s residential real estate.

Because plaintiffs failed to state a claim under the CRA, we affirm the trial court's grant of summary disposition for a reason different than that given by the trial court. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

#### B. Breach of Contract Claim

Plaintiffs also contend that the trial court erred in dismissing their breach of contract claim.

We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002). Whether the statute of frauds bars a contract claim is also a question that this Court reviews de novo on appeal. *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995).

In *Eerdmans v Maki*, 226 Mich App 360, 364-365; 573 NW2d 329 (1997), this Court held:

A valid contract requires mutual assent on all essential terms. Mere discussions and negotiation cannot be a substitute for the formal requirements of a contract. Before a contract can be completed, there must be an offer and acceptance. An offer is defined as the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. Acceptance must be unambiguous and in strict conformance with the offer. [Citations and internal quotation marks omitted.]

Furthermore, according to the statute of frauds, MCL 566.132:

(2) An action shall not be brought against a financial institution to enforce any of the following promises or commitments of the financial institution unless the promise or commitment is in writing and signed with an authorized signature by the financial institution:

(a) A promise or commitment to lend money, grant or extend credit, or make any other financial accommodation.

(b) A promise or commitment to renew, extend, modify, or permit a delay in repayment or performance of a loan, extension of credit, or other financial accommodation.

(c) A promise or commitment to waive a provision of a loan, extension of credit, or other financial accommodation.

Plaintiffs assert that attached to an April 17, 2003, e-mail, Kelly sent a proposal to Akouri stating that the purpose of the letter was to come to an agreement regarding the structure of the loan. However, the e-mail more accurately stated:

I'm sending a proposal for you and Nick to review. Nothing is set in stone, however, to move forward we need to come to an agreement regarding the structure so we may seek an approval of the loan request. . . .

Accordingly, it is clear that the e-mail and proposal are not a written promise or commitment, regardless of plaintiffs' assertion in his deposition testimony that Kelly told him to return it signed to accept the proposed terms. The e-mail clearly states that approval had yet to be sought for the loan request. Furthermore, even if this letter could be considered a written promise or commitment, after this letter was sent, Akouri sent Kelly a new DA agreement telling him that it would "cost him more to get this deal." Kelly sent Akouri an e-mail stating that he had yet to review the "new material." This evidence demonstrates that plaintiffs had requested a loan with different terms after the proposal letter was sent thereby rejecting the proposal.

Plaintiffs also assert that in a June 27, 2003, e-mail from Acho, wherein she stated that the " 'bank is willing to provide \$1,400,000 term loan.' " <sup>2</sup> However, this e-mail was not provided for our review on appeal. Further, our review of the lower court record reveals that, while plaintiffs cited to this e-mail in their response to defendant's motion for summary disposition, the document itself was not attached, nor is it located elsewhere in the lower court file. "This Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal." *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). Even assuming this e-mail exists and reads as plaintiffs represent, Acho's communication does not rise to the level of a signed promise or commitment when it merely stated that defendant "is willing" to provide the loan and also lacked any mention of any terms other than the loan amount. We conclude that the trial court did not err in dismissing plaintiffs' breach of contract claim.

### C. Other Claims.

Plaintiffs present no argument concerning their promissory estoppel claim. However, in *Crown Park Technology Park D & N Bank*, 242 Mich App 538, 549-550; 619 NW2d 66 (2000), this Court held that MCL 566.132(2) precludes all actions for the enumerated promises and commitments; it stated:

[A] party is precluded from bringing a claim – no matter its label – against a financial institution to enforce the terms of an oral promise to waive a loan provision. . . .

. . . By not specifying what sort of "action" MCL 566.132(2) prohibits, we read this as an unqualified and broad ban. . . . This is consistent with interpreting

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<sup>2</sup> This quote is taken from plaintiffs' brief on appeal.

MCL 566.132(2) . . .to preclude *all* actions for the enumerated promises and commitments, including actions for promissory estoppel.

Accordingly, plaintiffs' promissory estoppel claim was also properly dismissed.

Although plaintiffs, in their statement of the issues presented, take issue with the trial court's dismissal of their negligent and innocent misrepresentation claims, they present no argument in support of this assertion. Plaintiffs' failure to properly address the merits of these additional arguments constitutes an abandonment of the issues on appeal. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Therefore, we affirm the trial court's dismissal of these claims.

Affirmed.

/s/ Kirsten Frank Kelly  
/s/ Jane E. Markey  
/s/ Patrick M. Meter